No. 94-439

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

LAWRENCE MOORE,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 569; PAUL BLACKWOOD; THOMAS PRIDEMORE; JAMES WESTFALL; JOE HEISLER; DICK SMITH; TERRY GODSHALK, ET AL.; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; J.J. BARRY; S.R. McCANN; RICHARD ROBBINS; ATKINSON MECHANICAL, INC.; FISCHBACK & MOORE, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

As to Respondent Atkinson Mechanical Contractors Company, the sole question presented is whether the United States Court of Appeals for the Ninth Circuit properly affirmed the order of the United States District Court, Southern District, California granting Respondent Atkinson's Motion for Summary Judgment as to Petitioner's single claim for relief against said Respondent, to wit, breach of implied or in-fact contract predicated on breach of collective bargaining agreement pursuant to Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), where: (1) the Ninth Circuit affirmed the district court's finding that said Respondent exercised lawfully its express rights under the agreement; and (2) the National Labor Relations Board possesses exclusive jurisdiction of Petitioner's claim that said Respondent violated Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a).

LIST OF PARENT COMPANIES AND SUBSIDIARIES

Pursuant to The Rules of the Supreme Court of the United States, Rule 29.1., Respondent Walsh Construction Company, an Operating Division of Guy F. Atkinson Company, a Nevada corporation, as successor to Atkinson Mechanical Contractors Company, hereby states:

Guy F. Atkinson Company, a Nevada corporation, is a wholly owned subsidiary of Guy F. Atkinson Co. of California, a Delaware corporation. Guy F. Atkinson Co. of California is a publicly traded corporation.

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JURISDICTION

The Memorandum of the Ninth Circuit Court of Appeals was filed on June 10, 1994. Petitioner invokes the jurisdiction of this Court under The Rules of the Supreme Court of the United States, Rule 10.

STATUTORY PROVISIONS INVOLVED

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), provides, in pertinent part, that suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce may be brought in any district court of the United States having jurisdiction of the parties.

Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a) provides, in pertinent part, that it shall be an unfair labor practice for an employer: (1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 157 of this title; and (2) by discrimination in regard to hire or any term or condition of employment to encourage or discourage membership in any labor organization.

The Respondent, Walsh Construction Company, an Operating Division of Guy F. Atkinson Company, a Nevada corporation, as successor to Atkinson Mechanical Contractors Company (hereinafter "Respondent Atkinson" or "Atkinson"), respectfully requests that this Court deny the Petition for Writ of Certiorari in which Petitioner, Lawrence Moore, seeks review of the Ninth Circuit's Memorandum filed on June 10, 1994 in this case. Said Memorandum is set forth at page 111 of the Supplemental Appendix to the Petition for Writ of Certiorari (hereinafter "Pet. Supp. App.") filed by Petitioner herein.

STATEMENT

The Rules of the Supreme Court of the United States, Rule 14.1.(g) requires that a petition for writ of certiorari contain a concise statement of the case containing the facts material to the consideration of the questions presented. Petitioner's Statement of the Case does not comply with the foregoing mandate. (*See* Petition for Writ of Certiorari filed by Petitioner Lawrence Moore, hereinafter cited as "Pet.," at 2-36.) To assist this Court in the exercise of its discretionary jurisdiction, Respondent Atkinson hereinbelow sets forth the material facts and the proceedings below with citations to the record which pertain to Petitioner's action for breach of collective bargaining agreement against Respondent Atkinson.[1]

A. Facts Material to Petitioner's Claim Against Respondent Atkinson

At times relevant to this action, Respondent Atkinson and Respondent International Brotherhood of Electrical Workers Local 569 (hereinafter "Local 569") were signatories to a collective bargaining agreement, designated Project Construction Labor Agreement (hereinafter "Project Agreement").[2]

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[1] All citations herein to "CD at ___" refer to the civil docket entries by the Clerk of the United States District Court for the Southern District of California in District Court Docket No. CV-87-0172 B(M). A copy thereof was transmitted to the Ninth Circuit Court of Appeals by the Southern District Docket Court Clerk.

[2] Although Petitioner's Second Amended Complaint makes some reference to an "inside agreement" between

The Project Agreement was attached to the initial Complaint filed by Petitioner. (CD at 1.) The Recognition Clause of the Project Agreement provides that the Agreement applies to the "craft *employees* employed on the project" (emphasis added). (CD at 1; Project Agreement, Art. II at 3.) The Project Agreement Management Rights clause further provides at Article VII, subdivision F., "The Employer shall retain the right to reject any applicant referred by the Union." (CD at 1; Project Agreement at 9.) Article XI provides:

> Section 1. The Employer shall have the right to reject *any applicant referred* by the Union. . . .
>
> . . . .
>
> Section 3. In the event referral facilities maintained by the Union are unable to fill the requisition of the Employer . . . within 48 hours . . . the Employer shall be free to obtain workers from any source.

(CD at 1; Project Agreement at 17.)

On October 23, 1986, Billy Wells (hereinafter "Wells"), Atkinson's assistant electrical superintendent, issued a request to the Local 569 hiring hall for the referral of two electricians. (Supplemental Excerpts of Record of Defendant/Appellee Atkinson Mechanical,

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Atkinson and Local 569, the Project Agreement is the only agreement to which Atkinson was signatory on October 24, 1986 with Local 569. Atkinson was not signatory to any "inside agreement." (CD at 267; Declaration of Kent Senior filed with Defendant Atkinson's Motion for Summary Judgment on October 27, 1989 (hearing date: February 12, 1990).) Petitioner has presented no evidence to the contrary.

hereinafter cited "Atkinson SER," filed concurrently with Atkinson's Answering Brief in the Ninth Circuit, Transcript of Deposition of Billy Wells, hereinafter cited as "Wells Dep.," Atkinson SER at 250-51; Wells Dep. at 18-19:1-20.)

On October 24, 1986, Local 569 personnel informed Wells that Petitioner and Walter Whelan had been referred in response to Wells' request. (Atkinson SER at 241, 252; Wells Dep. at 19:13-20, 20:1-3.) Although Petitioner, on appeal and herein, contends that Wells rejected Petitioner's referral for Petitioner's "union-connected activities," (Pet. at 8), the facts before the district court were otherwise.

Wells testified that he was familiar with Petitioner's reputation as litigious and a troublemaker. (Atkinson SER at 257, 277-78; Wells Dep. at 25:10-12, 45:13-25, 46:1-14.) Wells was also familiar with the Project Agreement provision which allowed Atkinson to reject a hiring hall referral for any reason or no reason. (Atkinson SER at 252-53, 263; Wells Dep. at 20:18-25, 21:1-6, 32:23-25, 33:1.) Wells did not wish to accept Petitioner's referral because he believed Petitioner would disrupt his crew. (Atkinson SER at 255, 257; Wells Dep. at 23:14-16, 25.) Wells spoke to the Atkinson foreman under whom Petitioner would be working to obtain his opinion before Wells rejected Petitioner. (Atkinson SER at 255-53, 256, 257; Wells Dep. at 20:21-25, 21:1-6, 24:20-25, 25:1-3.) Wells also conferred with Atkinson's Project Manager, who took the precaution of consulting the Company attorney and confirmed that the Project Agreement authorized him to reject Petitioner's referral with or without cause. (Atkinson SER at 252, 253; Wells Dep. at 20:18-24, 21:1-7.) Wells testified

that he rejected Petitioner as part of his obligation to screen potential employees and pick the best ones he could find to do the job for his employer's advantage. (Atkinson SER at 282; Wells Dep. at 50:1-5.)

After conferring with the Project Manager, Wells telephoned Local 569 personnel, Rick White and Dick Smith, to reject the referral of Petitioner and Whelan but was informed that they had already been dispatched. (Atkinson SER at 259; Wells Dep. at 27:6-23.) When Wells informed the representative of Local 569 that he intended to "turn around" Petitioner and Mr. Whelan, the representative informed Wells that it was "his prerogative." (Atkinson SER at 259; Wells Dep. at 27:15-18.)

1. Petitioner's Misstatements of Fact

Pursuant to The Rules of the Supreme Court of the United States, Rule 15.1., a brief in opposition to a petition for writ of certiorari "should address any misstatements of fact set forth in the petition which have a bearing on the question of what issues would properly be before the court if certiorari were granted." Respondent Atkinson hereinbelow addresses the factual misstatements set forth in the Petition.

As to Respondent Atkinson, Petitioner states that "[h]e sued Atkinson Mechanical Contractors, Inc. . . . and Local 569 officers after they blacklisted him and rejected his acceptance of Atkinson's CBA request for an electrician." (Pet. at 6.) Petitioner's statement is misleading by virtue of Petitioner's use of the pronoun "they." Petitioner's only claim against Respondent Atkinson is for

breach of collective bargaining agreement based on said Respondent's having rejected Petitioner after he was referred to work by Local Union 569's hiring hall on October 24, 1986. Respondent Atkinson did not blacklist Petitioner.

Petitioner states that "Moore's hiring hall referral to Atkinson Mechanical in October, 1986 was rejected despite not working for it before and not knowing supervisor Billy Wells, who admitted rejecting him for protected 'union-connected' activities." (Pet. at 8.) Petitioner's statement that supervisor Wells did not know Petitioner is controverted by Wells' deposition testimony that he had known Petitioner for five or ten years before Wells rejected Petitioner's referral from Local 569 on October 24, 1986. (Atkinson SER at 238; Wells Dep. at 6:3-9.) Petitioner's statement that Wells rejected Petitioner for protected "union-connected" activities is controverted by the entirety of Wells' testimony on this point. In fact, Wells had observed Petitioner engage in what Wells considered to be not only disruptive but illegal conduct when Wells worked with Petitioner. (Atkinson SER at 278; Wells Dep. at 46:2-10.) Moreover, Wells testified that, in his opinion, Petitioner "doesn't give a damn about the 569 or anybody else; he's going to take anyone down he can or he's going to make a mint off of him." (Atkinson SER at 47; Wells Dep. at 47:11-20.)

Petitioner's statement concerning the manner in which Wells was hired by Respondent Atkinson, (Pet. at 8 n.5), is immaterial to Petitioner's claim for breach of collective bargaining agreement.

Petitioner states that "in a deposition Wells acknowledged his sympathetic relationship with Smith and the other Defendants in this case." (Pet. at 8 n.5.) Petitioner's statement misrepresents Wells' testimony that Wells and the individual Defendants herein were not even social friends but merely acquaintances who he might see at a union hall or picnic or with whom he might have "a beer after work." (Atkinson SER at 275-77; Wells Dep. at 43:21-25, 44-45:1-6.)

Petitioner's statement that Smith, White and Wells had several telephone conversations after Petitioner had been dispatched to Respondent Atkinson's jobsite and that Wells said he would reject Petitioner, (Pet. at 9), may imply that Wells' decision to reject Petitioner resulted from such conversations. Any such implication is controverted by Wells' testimony that he telephoned White and Smith and told them that he was going to reject Petitioner's referral. (Atkinson SER at 259; Wells Dep. at 27:8-18.)

Petitioner states that "[a] motion to compel discovery from Atkinson was never acted on [sic]." (Pet. at 17.) Said statement is not only irrelevant to the question herein presented, but, in fact, Respondent Atkinson provided further responses to Petitioner's discovery requests prior to the hearing on Petitioner's Motion to Compel. (Atkinson SER at 169-99.)

Petitioner's statement that "the court said Atkinson breached the CBA by refusal to participate in hearings," (Pet. at 27), is neither supported by any citation to the

record nor material to Petitioner's sole claim that Respondent Atkinson breached the collective bargaining agreement by rejecting his referral.

Petitioner's statement concerning Wells' purported testimony at trial, (Pet. at 30, 31), is immaterial to the question whether the court of appeals properly affirmed the district court's grant of summary judgment in favor of Respondent Atkinson. Further, Petitioner's statement that Wells testified at trial that Wells intended to "knock [Moore] on his butt," (Pet. at 30), appears to be an excerpt from Wells' deposition testimony. In that regard, Wells testified that *after* October 24, 1986, he had encountered Petitioner at the union hall in San Diego and at Local 357 on two to four occasions wherein Petitioner "began to get on [Wells'] case about another matter" and, on one occasion, Wells had told Petitioner "to get off my back or [Wells] was going to take him out which meant [Wells] was going to knock him on his butt." (Atkinson SER at 265-66; Wells Dep. at 33:16-25, 34:1-13.)

In short, Petitioner's effort to cast Wells in a Machiavellian role is not supported by the record. Based on Wells' personal observation of Petitioner and Petitioner's reputation, Wells held the opinion that Petitioner's conduct was disruptive, unlawful, and motivated solely by self-interest. Based on his opinion and without union encouragement, Wells decided to reject Petitioner's hiring hall referral and did so after confirming that the Project Agreement permitted such rejection. Thus, contrary to Petitioner's Statement of Facts, the record establishes neither breach of collective bargaining agreement nor violation of Petitioner's rights to engage in protected, concerted activity.

B. Proceedings Below

Petitioner's Second Amended Complaint, filed on December 21, 1988, alleged a single cause of action against Respondent Atkinson: a Fifth Cause of Action for breach of implied or in-fact contract under the rubric of "Discriminatory Dispatching." (CD at 107; Second Amended Complaint at 13:7-28, 14:1-10.)

On October 30, 1989, Respondent Atkinson filed a Notice of Motion and Motion for Summary Judgment or Alternatively for Summary Adjudication of Issues and accompanying papers. (CD at 204, 263, 265, 266, 267.) Thereafter, Petitioner separately served Opposition papers to Atkinson's Motion for Summary Judgment, (CD at 284, 285, 286); Respondent Atkinson filed its papers in reply to Petitioner's separate opposition papers, (CD at 294, 295, 296); and Petitioner filed a Supplemental Declaration in Opposition to Atkinson's Motion for Summary Judgment. (CD at 301.)

The district court's Order Granting Atkinson Mechanical's Motion for Summary Judgment was filed on May 10, 1990, and entered. (CD at 317; Pet. Supp. App. at 3-4.)

On May 11, 1990, the separate Judgment in a Civil Case which ordered and adjudged that Atkinson Mechanical's Motion for Summary Judgment as to the allegations of Petitioner's Fifth Cause of Action in the Second Amended Complaint be granted was signed, entered and copies thereof mailed. (CD at 318; Judgment in a Civil Case, Case No. 87-0172 B(M).)

Notwithstanding the district court's instruction to Petitioner at the summary judgment hearing on April 16, 1990, that the court's order granting summary judgment was a final order as to Atkinson and immediately appealable and, further, that Petitioner must file a timely appeal therefrom to protect any rights he might have to appeal, Petitioner took no action to appeal said order until he filed an appeal to the Ninth Circuit on April 17, 1992.

On November 2, 1992, Respondent Atkinson filed in the Ninth Circuit a Motion to Dismiss Plaintiff/Petitioner's appeal as untimely. By Orders dated November 27 and December 23, 1992, the Ninth Circuit denied Respondent's said motion.

By Memorandum filed June 10, 1994, the Ninth Circuit affirmed the district court's grant of summary judgment for Respondent Atkinson on Petitioner's breach of contract claim. The Ninth Circuit found that the Project Agreement "allowed an employer to reject an employee, provided the employer did not discriminate on the basis of union activity. . . . In rejecting Petitioner because he was litigious and disruptive, Atkinson did not breach the terms of the Agreement." (Pet. Supp. App. at 125-26.)

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Petition Improperly Requests This Court To Review Concurrent Findings of Fact by Two Courts Below

"A court of law, such as this Court is, rather than a court for correction of errors in factfinding, cannot

undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987). As to Respondent Atkinson, the sole task which Petitioner would have this Court undertake is a review of concurrent findings of fact by two courts below, in which findings Petitioner demonstrates no error at all.

In its Memorandum opinion herein, the Ninth Circuit addressed Petitioner's claim that Respondent Atkinson "breached the regional collective bargaining agreement by refusing to hire him."[3] (Pet. Supp. App. at 123.) The Ninth Circuit concurred with the district court's grant of summary judgment on the factual ground that the collective bargaining agreement which formed the predicate for Petitioner's breach of contract claim against Atkinson "allowed an employer to reject an employee, provided the employer did not discriminate on the basis of union activity. . . . " (Pet. Supp. App. at 125-26.) The Ninth Circuit further concurred with the district court's factual

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[3] As to Respondent Atkinson, Petitioner poses for review the question "[c]an the union business manager (who was once the defense contractor's supervisor and is one of the racketeers) and another contractor's supervisor collude to reject/blacklist a member properly referred through the CBA job referral procedure in order to punish him for protected union activities (suing the union and officers, and running for union office)?" (Pet. at i.) As evidenced by the facts hereinabove set forth in Respondent's Statement, the question as posed by Petitioner lacks any support in the record below and, for that reason, must be disregarded as presenting an improper question for review.

finding that, "[i]n rejecting Moore because he was litigious and disruptive, Atkinson did not breach the terms of the Agreement." (Pet. Supp. App. at 126.)

The express language of the Project Agreement which governed hiring hall referrals herein establishes the propriety of the Ninth Circuit's concurrence with the district court's factual finding that the collective bargaining agreement allowed an employer to reject an employee on nondiscriminatory grounds. (*See* CD at 1; Project Agreement at 3, 9, 17.) Thus, Petitioner cannot show error in the Ninth Circuit's concurrence with the district court that the Project Agreement gave Respondent Atkinson the right to reject Petitioner's referral. Accordingly, Petitioner cannot establish a viable basis for review by this Court on this point.

Similarly, that the Ninth Circuit concurred with the district court's factual finding that Respondent Atkinson's reasons for Petitioner's rejection did not breach the collective bargaining agreement does not constitute a proper subject of review on writ of certiorari. In that regard, Petitioner's assertion that "[t]here was no evidence that Petitioner was 'disruptive' when Atkinson was granted summary judgment . . . ," (Pet. at 47), posits only an evidentiary question which would require this Court to review the record to determine whether sufficient evidence existed for the district court's conclusion that Respondent Atkinson rejected Petitioner's referral for reasons allowed by the collective bargaining agreement. Moreover, as set forth in the recitation of facts herein, the record is replete with evidence which was before the district court that Petitioner's conduct was, *inter alia*, disruptive on the job. In view of the Ninth Circuit's

express concurrence with the district court's factual finding that Petitioner was rejected for reasons allowed by the collective bargaining agreement, review thereof is precluded by this Court's historic refusal to review concurrent findings of fact by two courts below.

Petitioner not only fails to make the requisite showing of obvious and exceptional error, but fails to show any error at all in the Ninth Circuit's concurrence with the factual findings on which the district court granted summary judgment as to Petitioner's claim of breach of collective bargaining agreement against Respondent Atkinson. Thus, this Court should deny the instant Petition for Writ of Certiorari.

II. The Petition Does Not Present a Question As to Whether a United States Court of Appeals Has Decided a Federal Question in a Way That Conflicts with Applicable Decisions of This Court

The Rules of the United States Supreme Court, Rule 10.1.(c) includes as a reason for granting a writ of certiorari that "a United States court of appeals . . . has decided a federal question in a way that conflicts with applicable decisions of this Court." Petitioner asserts that refusal to permit his breach of contract action to be litigated against Respondent Atkinson conflicts with decisions of this Court. (Pet. at v, 42.)

Preliminarily, Respondent Atkinson brings to this Court's attention that Petitioner's commingling of his argument concerning his action for breach of collective bargaining agreement against Respondent Atkinson with his action for breach of duty of fair representation against

Respondents "Union Defendants" not only obscures the question presented as to Respondent Atkinson but exhibits a disregard for this Court's admonition that petitions be "carefully prepared, contain *appropriate* references to the record, and present with *studied accuracy*, brevity and clearness whatever is essential to ready and accurate understanding of points requiring [this Court's] attention. . . . " *Furness, Withy & Company v. Yang-Tsze Insurance Association*, 242 U.S. 430, 434 (1917) (emphasis in original). Specifically, Petitioner's citations to numerous decisions of the National Labor Relations Board ("NLRB") in connection with unfair labor practice charges, (Pet. at 43-45, 47-48), are inapposite to Petitioner's claim against Respondent Atkinson for breach of collective bargaining agreement under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a). *See Textile Workers v. Lincoln Mills*, 353 U.S. 448, 451 (1957).

Petitioner blatantly misrepresents to this Court that Petitioner may base his claim of breach of collective bargaining agreement against Respondent Atkinson under Section 301 on a claim that Respondent Atkinson committed an unfair labor practice under Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a). (*See* Pet. at 43-47 (e.g., "both Atkinson and Local 569 officers committed an unfair labor practice" (Pet. at 46).) In that regard, the sole decision of this Court cited by Petitioner which even discusses Section 301, *Breininger v. Sheet Metal Workers International Association Local Union No. 6*, 493 U.S. 67 (1989), does not so hold.

Petitioner cites *Breininger* for the erroneous proposition that "[f]ederal courts have concurrent jurisdiction with the NLRB over breaches of a union's duty of fair representation in the administration of a hiring hall and

an accompanying suit against a contractor for breach of contract." (Pet. at 42.) Petitioner's error is found in the fact that *Breininger* merely holds that federal courts have concurrent jurisdiction with the NLRB over an unfair labor practice charge *against a union* when such charge also might constitute a claim of breach of the union's duty of fair representation. *Breininger*, 493 U.S. at 75. *Breininger* neither addressed whether nor held that federal courts have concurrent jurisdiction with the NLRB over an employee's *claim for breach of collective bargaining agreement against an employer under Section 301 of the Labor Management Relations Act*. Further, *Breininger* neither addressed whether nor held that federal courts have concurrent jurisdiction with the NLRB over an employee's *unfair labor practice charge against an employer under Section 8(a) of the National Labor Relations Act*.

In *Breininger*, this Court addressed, in pertinent portion, whether the NLRB has exclusive jurisdiction over a claim that a union both breached its duty of fair representation and violated the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.* by discriminating in union hiring hall referrals. *Breininger*, 493 U.S. at 70. This Court held that federal court jurisdiction exists over a fair representation claim *against the union*, irrespective of whether such claim arose out of the operation of union hiring halls so as to constitute an unfair labor practice charge against a union under Section 8(b) of the National Labor Relations Act, 29 U.S.C. § 158(b). *Id.* at 74-75. In so holding, this Court iterated the general principle that "neither state nor federal courts possess jurisdiction over claims based on activity that is "arguably" subject to §§ 7 or 8 of the NLRA." *Breininger*, 493 U.S. at

74 (citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959)). Nevertheless, based on the rationale and holding in *Vaca v. Sipes*, 366 U.S. 171, 177 (1967) "that *Garmon*'s pre-emption rule does not extend to suits [against a union] alleging a breach of the duty of fair representation[,]" this Court concluded "[t]hat a breach of the duty of fair representation might also be an unfair labor practice is thus not enough to deprive a federal court of jurisdiction over the fair representation claim." *Breininger*, 493 U.S. at 74-75.

Accordingly, *Breininger* does not stand, as Petitioner implies, for the proposition that the *Vaca* fair representation exception to *Garmon*'s preemption rule operates to extinguish the NLRB's exclusive jurisdiction over an unfair labor practice brought pursuant to Section 8(a) of the National Labor Relations Act against an employer. Further, Petitioner has not cited and cannot cite any decisions of this Court which would oust the NLRB of exclusive jurisdiction over Petitioner's claim under Section 8(a) that Respondent Atkinson committed an unfair labor practice when it rejected Petitioner's hiring hall referral so as to permit the district court to consider such claim in connection with Petitioner's Section 301 claim for breach of collective bargaining agreement.

As demonstrated, Petitioner offers no decision of this Court which conflicts with the Ninth Circuit's conclusion that the district court properly adjudicated Petitioner's Section 301 breach of collective bargaining agreement claim against Respondent Atkinson. Thus, Petitioner again fails to provide a reason which would warrant review by this Court and writ of certiorari should be denied.

III. The Petition Does Not Call for an Exercise of This Court's Power of Supervision

The Rules of the Supreme Court of the United States, Rule 10.1.(a) includes as a reason for grant of certiorari that "a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

Petitioner asserts "[t]he Appeals Court's affirmation of unfair labor practices by holding the employer could reject under the CBA if he didn't discriminate on the basis of 'union activity-or race or sex' . . . overstepped the boundaries of accepted procedure to sanction lower court departure from the usual course of judicial proceedings so as to require exercise of this Court's power of supervision." (Pet. at 48.)

As demonstrated herein, Petitioner's invocation of this Court's power of supervision is rendered nugatory by the absence from the record below of any indication that the Ninth Circuit departed in any manner from the usual course of judicial proceedings or sanctioned such departure by a lower court by affirming the district court's grant of summary judgment in favor of Respondent Atkinson on the grounds stated in the Ninth Circuit's Memorandum.

This Court has emphasized that it will not grant a writ of certiorari "except in cases involving principles the settlement of which is of importance to the public as distinguished from the parties. . . . " *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 388, 393 (1923). As to

Respondent Atkinson, Petitioner's request for review amounts to no more than an impermissible request that this Court review concurrent findings of fact by two courts below as to Petitioner's claim that Atkinson breached the collective bargaining agreement. Hence, as to Respondent Atkinson, Petitioner's case presents neither any issue of public importance nor any special and important reason for review by this Court and Petitioner's request for review on writ of certiorari should be denied.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

DATED: October 11, 1994

Respectfully submitted,

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